

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

ROBERT E. THOMAS
Claimant

VS.

GENERAL MOTORS, LLC
Self-Insured Respondent

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Docket No. 1,066,017

ORDER

Claimant requests review of the October 9, 2013, preliminary hearing Order entered by Administrative Law Judge (ALJ) Kenneth J. Hursh.

APPEARANCES

Zachary A. Kolich, of Shawnee Mission, Kansas, appeared for the claimant. Elizabeth R. Dotson, of Kansas City, Kansas, appeared for respondent and its insurance carrier.

RECORD AND STIPULATIONS

The Board has adopted the same stipulations and considered the same record as did the ALJ, consisting of the transcript of Preliminary Hearing from October 9, 2013, with exhibits attached and the documents of record filed with the Division.

ISSUES

The ALJ denied claimant's request for benefits after finding claimant failed to file a timely application for hearing, pursuant to K.S.A. 44-534(b), Furse 2000.

Claimant appeals, arguing that although his application for hearing was filed after the statutory 3 year limitation, that time should be extended by 2 years because he received medical treatment before the 3 year limit and before his claim was denied. Claimant's Application for Hearing was filed on July 3, 2013, claiming a date of accident on June 22, 2010.

Respondent argues the ALJ's Order should be affirmed.

FINDINGS OF FACT

Claimant has been working for respondent for 20 years. On June 22, 2010, he felt a pop in his back while moving boxes of air bags to a workstation. He testified that he had been reaching above his head to bring a box of air bags down to the floor and when he bent over he felt that popping sensation in his back. He informed his supervisor of the incident and received a pass to be checked out at respondent's medical clinic. While in the clinic, claimant was treated by Jesse W. Cheng, M.D. An injury report was filled out and claimant was provided with an ice wrap for his low back.

Claimant was returned to full duty and instructed to come back, when possible, throughout the rest of his shift. Claimant returned for another ice treatment on June 24, 2010, two days later. This was claimant's last documented treatment before the 2013 flare-up discussed below. Claimant testified he continued to have ongoing problems with his low back. On a good day, his discomfort was 1 out of 10. When he had a flare-up, which he testified happened every couple or three months, it would be difficult for him to walk and the pain would go down his pelvic region into his leg.

Claimant suffered a flare-up in 2013, returning to Dr. Cheng on June 6, 2013. He testified that he did not do anything at work or outside of work to cause the flare-up. His current symptoms are pain and difficulty going from a sitting to a standing position and vice versa. He also has a tingling sensation in his legs. Claimant admits to having problems with his back before June 22, 2010, undergoing an MRI at the end of 2009. Claimant was diagnosed with a lumbar sprain at that time. He testified he had not missed any work before June 2013, because his flare-ups had always occurred close to a weekend. He was able to recoup during that time off and then could return to work.

Claimant had an x-ray taken on June 6, 2013, at the request of Dr. Cheng. Following this x-ray, claimant was told he had degenerative disc disease in his back. Despite having nonstop pain in his back for three years after the accident, claimant did not seek additional treatment until June 6, 2013. Claimant sought medical treatment at this time because the pain had become bad enough that he was unable to work for 4 days. After this absence, claimant was required to be checked out by plant medical before returning work. Claimant reported to Dr. Cheng that his back started getting worse in the fall of 2012, while he was working a die-setting job. He had pain, tightness and stiffness in his back while working in respondent's body shop in March 2013. Until June 6, 2013, claimant did not go to respondent's medical clinic, nor did claimant report any injury or flare-up to respondent.

Claimant admits that he was in plant medical for treatment of a shoulder injury between 2010 and 2013, and during those visits he did not mention his low back pain. Claimant's benefits were suspended on June 17, 2013, and he was no longer allowed to speak with plant medical.

Claimant filed his application for hearing with the Division on July 3, 2013, citing a date of accident of June 22, 2010. Claimant continues to work full duty for respondent.

Claimant met with Dr. Edward Prostic on August 16, 2013, at the request of his attorney. Claimant reported pain across his low back with some radiation down the posterior right thigh to the knee, with episodic paresthesias, and prior left leg pain. He reported the pain being worse with changing positions from sitting to standing and with bending, squatting, twisting and lifting.

Dr. Prostic opined claimant had degenerative disc disease and instability at L5-S1, from repetitious minor trauma and a specific accident on June 22, 2010. He felt conservative treatment was appropriate until claimant's neurologic symptoms worsen. Dr. Prostic also felt the work-related trauma was the prevailing factor for claimant's injury, the medical condition and need for medical treatment.

Claimant met with Dr. Chris Fevurly on October 1, 2013, for an examination at respondent's request. Claimant had complaints of back pain and occasional right posterior thigh tingling. Dr. Fevurly examined claimant and opined there was chronic low back pain without current evidence for lumbar radiculopathy or spinal stenosis, present since 2008 and aggravated by claimant's demanding work activity. He also found advanced degenerative disc changed and grade I anterolisthesis of L5 on S1.

Dr. Fevurly opined that the prevailing cause of the mechanical low back pain was related to the underlying moderately severe degenerative changes throughout claimant's lumbar spine. He opined that the degenerative changes occur as a natural consequence of living and aging and are not the result of claimant's job duties. Dr. Fevurly found claimant did not have a rateable permanent impairment to the lumbar spine as a result of the work-related injury. He did not assign any restrictions, stating claimant needs to decide if he can cope with the essential functions of respondent's various production line jobs. He went on to find that claimant may want to pursue further testing or treatment through his own health plan in regard to management of the mechanical low back pain. Dr. Fevurly felt the need for treatment is not related to a work-related injury or condition.

PRINCIPLES OF LAW AND ANALYSIS

K.S.A. 44-534(b) Furse 2000 states:

(b) No proceeding for compensation shall be maintained under the workers compensation act unless an application for a hearing is on file in the office of the director within three years of the date of the accident or within two years of the date of the last payment of compensation, whichever is later.

Claimant's Application for Hearing alleges a date of accident on June 22, 2010. He was provided medical treatment in respondent's clinic and returned to his regular job. He

continued in that capacity until June 6, 2013, seeking no medical treatment during that period of time. Over two years passed between claimant's receipt of medical treatment and his filing of the Application for Hearing. When the time provided by statute within which to file a claim for compensation has passed, the right to recover compensation under the statute is lost and cannot be revived by subsequent voluntary payments of compensation by the employer.¹

The Application was filed on July 3, 2013, more than three years from the date of accident. The ALJ held, and this Board Member agrees, claimant has failed to comply with the requirements of K.S.A. 44-534(b) Furse 2000. Claimant's claim for benefits is time barred.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.² Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2012 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed. Claimant has failed to meet the filing requirements of K.S.A. 44-534(b) Furse 2000.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Kenneth J. Hursh dated October 9, 2013, is affirmed.

¹ *Graham v. Pomeroy*, 143 Kan. 974, 57 P.2d 19 (1936).

² K.S.A. 2012 Supp. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of December, 2013.

HONORABLE GARY M. KORTE
BOARD MEMBER

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Kenneth J. Hursh, Administrative Law Judge